



**FEDERAL
CHAMBER OF
AUTOMOTIVE
INDUSTRIES**

13 July 2026

Consumer Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

via email: consumerlaw@treasury.gov.au

Dear Consumer Policy Unit,

Unfair trading practices protections for small businesses
Consultation paper

I attach for your consideration a submission from the Federal Chamber of Automotive Industries (FCAI) responding to the above Consultation paper.

The FCAI would be pleased to provide further information in relation to its submission if that would be of assistance.

Yours sincerely

Tony Weber
Chief Executive

1. EXECUTIVE SUMMARY

The Federal Chamber of Automotive Industries (FCAI) is pleased to provide this submission in response to Treasury's consultation paper, *Unfair trading practices protections for small businesses* (the consultation paper).

The FCAI is the peak industry body for the Australian importers and distributors of passenger motor vehicles, sports utility vehicles, light commercial vehicles, motorcycles and off highway vehicles. FCAI members supply about 98% of new vehicles to the Australian market each year. Members are listed at <https://www.fcai.com.au/about-fcai/member-manufacturers/>.

The FCAI and its members fully support the provision of appropriate consumer protections under the Australian Consumer Law (ACL)¹. The FCAI acknowledges the importance of having in place a robust regime that provides Australian consumers with a range of appropriate guarantees and protections.

The consultation paper seeks to implement a Government commitment to extend unfair trading practices protections to small businesses, but to do so in an effective and proportionate way. The specific policy proposal set out in the consultation paper is to:

extend the proposed consumer general prohibition on unfair trading practices to also protect small businesses where they acquire goods or services as a consumer.²

The FCAI's comments throughout this submission are made in the context of the automotive sector. FCAI members (OEMs) appoint and deal with franchised new vehicle dealer networks nationally and are directly regulated by the *Competition and Consumer (Industry Codes-Franchising) Regulations 2024* (Cth) (the 2024 Franchising Code) and the ACL. The position of the FCAI can be summarised as follows:

- the policy proposal to extend the proposed unfair trading practices general prohibition to a consumer carrying on a small business where the transaction in question resembles that of an individual consumer is conditionally supported;
- the blanket extension of a general unfair trading practices protection to business-to-business transactions is strongly opposed;
- the automotive sector is heavily regulated through a range of existing laws, including the revised 2024 Franchising Code (in force since 1 April 2025, with key rules commencing 1 November 2025), the strengthened unfair contract terms regime (itself under a review announced 24 February 2026), the subscription reforms in the *Competition and Consumer Amendment (Unfair Trading Practices) Act 2026* (Cth) passed by Parliament on 2 July 2026 and commencing on 1 July 2027, and the doubled civil penalty framework in effect since 28 March 2026³. These existing laws and regulations extend extensive and comprehensive protections to new vehicle dealer franchisees;
- the FCAI firmly believes that additional regulation should not be imposed in the absence of identified harms that cannot be addressed through existing laws. Such gaps within existing regulation have not been identified in the automotive context; and
- Government should avoid creating overlapping standards governing the same commercial conduct. Duplicating regulation creates legal uncertainty, encourages forum shopping and parallel proceedings, increases compliance costs and puts Australia out of step with international norms.

The remainder of this submission is structured as follows:

¹ Schedule 2, *Competition and Consumer Act 2010* (Cth).

² The Treasury, *Unfair trading practices protections for small businesses*, Consultation paper, June 2026, page 8.

³ *Treasury Laws Amendment (Doubling Penalties for ACCC Enforcement) Act 2026* (Cth).

- section 2: general commentary on the specific automotive proposals set out in the consultation paper;
- section 3: summary;
- Annexure A: Table of FCAI comments in relation to the relevant questions posed in the consultation paper;
- Annexure B: Norton Rose Fulbright white paper (November 2025); *Why the proposed prohibition on “unfair trading practices” should be limited to consumer transactions and should not apply to business-to-business dealings*; and
- Annexure C: Analysis of alleged automotive unfair trading practices and the protections available under existing law.

2. GENERAL COMMENTARY ON THE SPECIFIC AUTOMOTIVE PROPOSAL SET OUT IN THE CONSULTATION PAPER

The extension of general unfair trading practices protections to business-to-business transactions is strongly opposed

In the automotive context, business-to-business dealings would primarily encompass the interactions between OEMs and new vehicle dealers.

The FCAI strongly opposes the extension of the prohibition on unfair trading practices to business-to-business dealings for the following reasons:

- such an extension would conflict with well-established legal precedent;
- the conduct that prompted the regulatory concern resulting in the unfair trading practices legislation⁴ was overwhelmingly digital-to-consumer in character and was directed at subscription traps, drip pricing and hidden fees;
- there are fundamental differences between business-to-consumer and business-to-business dealings;
- the extensive existing regulation applying to the automotive sector already provides for extensive fairness and transparency in business-to-business dealings; and
- few international jurisdictions broadly regulate unfair trading in business-to-business dealings. Those that do (Japan and South Korea) rely on defined lists of prohibited conduct rather than an open general standard, and do not do so alongside an existing overlay of misleading conduct, unconscionable conduct and unfair contract terms protections of the kind that already applies in Australia.

At the request of the FCAI, Norton Rose Fulbright prepared a white paper that focused on the legal reasons why it was inappropriate and unnecessary to extend any new general and undefined prohibition on unfair trading practices to business-to-business dealings. This paper forms Annexure B to this submission.

Increased costs

The consultation paper acknowledges that the introduction of a new provision could have a chilling effect on efficient bargaining, reduce contracting flexibility and raise input costs that are ultimately passed through to consumers.⁵ Those risks are compounded by legal uncertainty. A new prohibition would introduce:

- an uncertain interaction with the unfair contract terms regime, which already voids and penalises unfair terms subject to a legitimate-interests element that a general prohibition may not contain;
- an uncertain relationship with statutory unconscionability - in particular, whether *unfair* is intended to sit below the ACL section 21 threshold and, if so, how far below;
- an uncertain interaction with the 2024 Franchising Code’s good faith duty, which already governs the same negotiating and termination conduct with civil penalties attached; and

⁴ *Competition and Consumer Amendment (Unfair Trading Practices) Act 2026* (Cth).

⁵ The Treasury, *Unfair trading practices protections for small businesses, Consultation paper*, June 2026, page 11.

- an untested standard with no body of jurisprudence, whose practical meaning would be settled only through years of litigation.

Sequencing

The FCAI notes that each of the regulatory regimes that a new unfair trading practices prohibition would overlap is new or under active review. The Franchising Code of Conduct has been subject to continual review.⁶ The 2024 Franchising Code commenced on 1 April 2025, its economy-wide compensation and return-on-investment rules commenced on 1 November 2025, the strengthened unfair contract terms regime commenced in November 2023 and is under a review announced on 24 February 2026, and the unfair trading practices consumer prohibition was passed by Parliament on 2 July 2026 and will not commence until 1 July 2027. The consumer prohibition will therefore not have operated for a single day before any business-to-business extension could be enacted. Orderly regulation requires that each measure be allowed to operate, and be evaluated, before a further general standard is layered on top.

Limitations required

The FCAI further notes that, as drafted, the proposed general prohibition contains no element of materiality, no financial detriment test or financial eligibility threshold. Potentially the general prohibition would also apply to automotive franchisees who are outside of the small business threshold (ie: are large businesses). It is not appropriate that such an undefined and generalised protection be directed at large commercial enterprises.

Should the Government determine that a general business-to-business prohibition should nonetheless proceed, the FCAI submits that such a prohibition should (at a minimum) contain some limitations, as set out below:

- a legitimate-business-interests exception, mirroring ACL sections 22(1)(b) and 24(1)(b), so that conduct reasonably necessary to protect the legitimate interests of the party engaging in it is not caught;⁷
- a threshold requirement of significant bargaining-power imbalance, so the prohibition operates as the "safety net" the ACCC describes rather than a general fairness review of commercial contracts between capable parties; and
- a harm element confined to financial detriment, which keeps the provision anchored to measurable effects and avoids importing the "*value-laden philosophising*" against which Beach J cautioned.⁸

The NSW Motor Dealers and Repairers Act model should not be nationalised

The FCAI notes that some parties have indicated that Part 6 of the *Motor Dealers and Repairers Act 2013* (NSW) (sections 141-148, *Unfair contracts and unjust conduct affecting motor dealers*) is a suitable protection mechanism that could be adopted by the Federal Government. Part 6 confers on the NSW Civil and Administrative Tribunal - after a mandatory NSW Small Business Commissioner step (sections 144-145) - jurisdiction to declare supply contract terms unfair and manufacturer conduct unjust, with uncapped compensation orders (section 147).

Two features tell against nationalising it. First, its unfairness test (section 142(1)) replicates the ACL (section 24(1)) almost word for word, and section 148 expressly preserves the operation of other laws. For NSW dealers, the regime is already a State-level restatement of the national unfair contract terms standard, sitting alongside the ACL and the 2024 Franchising Code. Secondly, it sits awkwardly beside the 2024 Franchising Code's

⁶ The last major review was completed in December 2023 by Dr Michael Schaper. Importantly, the Schaper Review found the Code was generally fit for purpose, Part 5 (now Part 6) of the Code relating to new vehicle dealership agreements was operating as intended and not producing any unintended consequences, and that the sector requires some respite from a constant process of review.

⁷ The Full Court in *Mercedes* treated the absence of any finding that MBAP's terms *went beyond what was reasonably necessary to protect [its] legitimate interest* as central ([2025] FCAFC 86 at [183]-[190]). A prohibition without this exception would capture conduct that three courts have held lawful.

⁸ *AGH WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022 at [12].

national scheme and predates the 2020-21 and 2024 dealership-specific Code reforms that now cover the same field with penalties. It is the FCAI's view that nationalising the NSW legislation would entrench, rather than resolve, the overlap problem between regulation.

Regulation within the automotive sector

FCAI members and franchised new vehicle dealers are directly regulated by the 2024 Franchising Code (including Part 6, *New vehicle dealership agreements*) and the ACL. The FCAI believes that these mechanisms effectively and comprehensively address business practices within the automotive sector.

The major existing protections are summarised below.

ACL protections

- Misleading or deceptive conduct (section 18) - prohibitions on misleading or deceptive conduct have been broadly interpreted by the Courts and include conduct that has the *potential* to mislead or deceive.
- Unconscionable conduct (sections 20-22) - capture exploitative conduct in commercial dealings.
- Prohibitions on unfair contract terms (Part 2-3) – now extend to small business contracts.

2024 Franchising Code protections

- An express obligation to act in good faith (section 18) that extends beyond the common law duty. No such specific obligations and sanctions currently apply to contracting parties outside code-regulated sectors.
- Comprehensive pre-contractual disclosure (14-day disclosure period (sections 20-25), followed by a 14-day cooling off period) (sections 50-53)).
- Pre-contractual disclosure of capital expenditure (section 47).
- Restrictions on agreement provisions (restraint of trade (section 42), termination (sections 54-59), transfer (sections 24 and 48-49), and no retrospective variation without consent (section 62)).
- Statements with respect to independent advice (section 27).
- Mandatory dispute resolution procedures (Part 5).
- Mandatory provisions relating to compensation for early termination and specification of how compensation is calculated (section 45).
- Mandatory return on investment provisions (section 46).
- Mandatory buyback or compensation for new road vehicles, spare parts and special tools in the event of early termination or non-renewal (section 45(3)).
- Registration on the Franchise Disclosure Register for public inspection (sections 92 and 93).

Enforcement

- The ACCC has strong enforcement powers and resources. Substantial civil pecuniary penalties apply to almost every provision in the Code.

The FCAI submits that the sophisticated nature of the commercial transactions between OEMs and new vehicle dealers are such that the existing protections available to the parties under the ACL, the 2024 Franchising Code and other relevant legislative regimes are entirely adequate. The FCAI believes that in these circumstances a further layer of regulation is unnecessary.

Overlapping and confusing regulation

Given the comprehensive regulation that already exists within the automotive sector, the FCAI is concerned at the confusion and additional costs that will be incurred as a result of overlapping and duplicate regulation should a new general unfair trading practices prohibition be introduced.

A single episode of ordinary commercial conduct - a franchisor declining to renew a dealer agreement and offering a new agreement on different financial terms - would be simultaneously governed by:

- the 2024 Franchising Code (good faith, section 18; compensation, sections 43 and 45; return on investment, sections 44 and 46; and termination process, sections 54-59), enforceable via the *Competition and Consumer Act 2010* (Cth) (CCA) section 51ACB with penalties of 600 penalty units per breach for most obligations, increasing for the dealership compensation and return-on-investment provisions to the greater of \$10 million, three times the benefit or 10 per cent of adjusted turnover;
- the ACL's existing general protections (sections 18, 20-22, 23-24, 50) - with maximum penalties for the penalty-bearing provisions (unconscionable conduct, unfair contract terms and the Part 3-1 unfair practices, including section 50) the greater of \$100 million, three times the benefit or 30 per cent of adjusted turnover for a body corporate, and \$2.5 million otherwise (sections 224(3)-(3A), following the *Treasury Laws Amendment (Doubling Penalties for ACCC Enforcement) Act 2026* (Cth)); and
- a new, open-textured business-to-business unfairness standard - assessed after the fact, by reference to concepts (such as *unreasonably distort, detriment*) whose application to arm's-length commercial negotiation no court has yet considered.

That is, there would occur overlapping regulation of substantially the same conduct, with three different tests, three penalty regimes and no interaction rules.

Absence of identified harms within the automotive sector

The FCAI submits that additional regulation should not be imposed in the absence of identified harms that are not addressed through existing laws. The FCAI does not believe that any unfair trading practices affecting the commercial relationship between OEMs and new vehicle dealers have been identified where a remedy cannot be found in either the 2024 Franchising Code or the ACL. In such circumstances, duplicating regulation is wasteful, costly and counterproductive.

The consultation paper records the submission of the Australian Automotive Dealers Association (AADA) that the automotive sector faces unfair trading practices, citing examples of:

*terminating dealer agreements and pressuring dealers to accept inadequate compensation within very tight deadlines, and making unilateral significant changes to the business model with little to no negotiation.*⁹

These examples have recently been thoroughly tested in litigation, on a full evidentiary record, at every level of the federal judiciary:

- At first instance, in *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd*,¹⁰ Beach J rejected every cause of action advanced - contract, franchising code good faith, statutory unconscionability and economic duress - in a proceeding brought by 38 of the then 49 Mercedes-Benz dealers and tried through four exemplar applicants, following a trial of eight weeks, and with reasons running to 3,752 paragraphs (654 pages).¹¹
- On 9 July 2025, the Full Court (Moshinsky, Bromwich and Anderson JJ) dismissed the dealers' appeal on the basis that none of the appeal grounds had been made out.¹²

⁹ The Treasury, *Unfair trading practices protections for small businesses, Consultation paper*, June 2026, page 14. See also AADA, *Response to Unfair Trading Practices – Supplementary Consultation Paper*, December 2024.

¹⁰ *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022.

¹¹ *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2025] FCAFC 86 at [5].

¹² *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2025] FCAFC 86 at [15]-16].

- On 6 November 2025, the High Court refused the dealers' application for special leave to appeal,¹³ holding that the proposed grounds concerning statutory unconscionability and the franchising code duty of good faith had insufficient prospects of success to warrant the grant of special leave. Special leave to appeal was refused with costs.

The Mercedes-Benz litigation clearly demonstrates that the existing statutory framework is capable of fully testing the allegations advanced. Every allegation now apparently relied on by the AADA in support of reform (pressured timeframes, take-it-or-leave-it terms, inadequate compensation, unilateral change to a business model) was pleaded, tried on a complete evidentiary record, and determined against the very statutory standards (ACL sections 20-22; the Code's section 18 good faith duty) said to be inadequate. The fact that the dealers did not derive the outcome they sought does not mean the legislative framework is not comprehensive and extensive.

The FCAI submits that it is inaccurate to suggest that the existing law is unable to examine the conduct the subject of the AADA's unfair practices assertions. The imposition of a new general prohibition on nebulous unfair trading practices (such as "bargaining power imbalances") would not fill a gap in regulation, but would in fact conflict with existing law, cause legal uncertainty and introduce unnecessary cost into franchising arrangements.

An analysis of the alleged unfair trading practices asserted to exist within the automotive sector and the protections available under existing law forms Annexure C to this submission.

Specific characteristics of new vehicle dealerships

The consultation paper noted the divergence of views on the question as to whether unfair trading protections should be extended to business-to-business transactions. Many of the proponents of such an extension pointed to the presence of an imbalance of bargaining power between businesses, a lack of resources, or a fear of retribution as the rationale for doing so.¹⁴

The FCAI asserts that such circumstances do not apply in the automotive sector, and specifically to the commercial relationship between OEMs and new vehicle dealers. Automotive franchisees are well positioned to ensure they are fully informed of the rights and obligations attaching to franchise agreements prior to entering into the arrangements. They are not entering into contracts where they do not understand the risk nor are they poorly placed to manage and understand any risks. They are not subject to bargaining power imbalances, predatory business conduct or limited mechanisms for redress.

The overwhelming majority of automotive dealers are significant businesses with ready access to legal, financial and business advice - either through an inhouse capacity or via external legal, financial and accounting advisory firms. They have active industry bodies that represent their interests and regularly combine with other dealers to review agreements and obtain advice. Independent data clearly demonstrates automotive dealership ownership is becoming more concentrated and is increasingly dominated by sophisticated investors – whether they be family-owned conglomerates, listed companies, or foreign owned entities.¹⁵ Large dealerships can capitalise on economies of scale and brand diversification to fortify their market position. The ten largest dealer groups now control over 27% of all dealership rooftops.¹⁶ Only 6% of the 3,320 dealers across Australia operate one dealership.¹⁷

¹³ *AHG WA (2015) Pty Ltd (ACN 603 598 750) T/A Mercedes-Benz Perth & Westpoint Star Mercedes-Benz & Ors v Mercedes-Benz Australia/Pacific Pty Ltd (ACN 004 411 410) & Ors* [2025] HCADisp 260 M61/2025.

¹⁴ The Treasury, *Unfair trading practices protections for small businesses, Consultation paper*, June 2026, page 11.

¹⁵ Deloitte Motor Industry Services, *2025 Dealership Ownership Study*, March 2025.

¹⁶ Peter Warren Automotive Holdings operates more than 80 franchise operations across 30 OEMs ([H1-FY26-Results-Presentation.pdf](#)); Eagers Automotive Limited has a turnover of \$13 billion (FY 25), a new vehicle market share of 13.9% and approximately 450 dealer points in Australia and New Zealand (Eagers Automotive FY 25 Results); Autosports Group Limited financial results for the half year ended 31 December 2025 indicated revenue of \$1.52 billion and a gross margin of 19.1% (<https://investors.autosportsgroup.com.au/investors/?page=asx-announcements>).

¹⁷ Deloitte Motor Industry Services, *2025 Dealership Ownership Study*, March 2025.

New vehicle dealers are not vulnerable businesses

The case for unfair trading practices protection rests on consumer-like vulnerability, information asymmetry, resource constraints, and inability to protect one's own interests.

A franchisee with 100 or more employees and more than \$10 million turnover - which accurately describes many metropolitan new vehicle dealer groups, including listed entities - exhibits none of those features. Such dealers are “*well-heeled individuals and corporations*”¹⁸ that take legal advice, price contractual risk, negotiate collectively through dealer councils, and litigate to the High Court when it suits them. Extending a vulnerability-based protection to them inverts its rationale and would make the ACL an instrument for reallocating commercial risk between large enterprises.

Conditional support for extension of unfair trading practices to business-to business transactions where businesses acquire goods and services in their capacity as a consumer

The FCAI acknowledges that in some sectors small businesses purchasing goods or services can face similar vulnerabilities to individual consumers in certain transactional contexts. The FCAI does not oppose extending the proposed general prohibition to protect small businesses where they acquire goods or services in their capacity as a *consumer*, subject to the conditions outlined below:

- the application of an appropriate monetary threshold for the amount paid or payable for the goods or services acquired by the small business acting as a consumer; and
- a clear definition of when a small business is acting as a consumer, including exclusion from the consumer-related protections when a small business acquires the goods or services for the purposes of re-supply.

3. SUMMARY

In summary, the FCAI strongly opposes the extension of unfair trading practices to business-to-business transactions within the automotive sector. In doing so, the FCAI notes the extensive existing laws regulating the commercial relationship between OEMs and new vehicle dealers and the range of available remedies available to new vehicle dealers.

The FCAI submits that the case for an economy-wide business-to-business prohibition has not been made. The business-to-business unfair trading examples relied on in the consultation paper fall into one of three categories:

- conduct already prohibited under existing law, including misleading and deceptive conduct, coercion, unconscionable conduct, unfair contract terms, duty of good faith and other contraventions of the 2024 Franchising Code;
- conduct that has been thoroughly tested in litigation on a full evidentiary record - which reflects a considered judicial and legislative judgment about where the line between robust commerce and unlawful conduct sits, not an absence of applicable law; and
- conduct that Parliament has recently addressed through targeted amendment of the 2024 Franchising Code, including early termination compensation, return on investment requirements and capital expenditure controls.

The FCAI submits that any further amendment to unfair trading practices legislation should satisfy four principles and should:

¹⁸ AGH WA (2015) *Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* [2023] FCA 1022 at [248].

- be evidence-based and respond to demonstrated conduct that existing law cannot reach;
- be proportionate to the scale of any demonstrated harm; and
- be coherent with the existing hierarchy of the ACL, the 2024 Franchising Code and dealership-specific regulation; and
- be no broader than necessary to address any identified gap.

The FCAI remains concerned that further regulation inappropriately applied to an already heavily regulated sector will have a chilling effect on continued innovation in product development and commercial interactions and unnecessarily add further costs to the supply of new vehicles into the Australian market.

The FCAI would welcome the opportunity to discuss this submission, including through the Decision Regulatory Impact Statement process.

ANNEXURE A: FCAI COMMENTARY IN RELATION TO RELEVANT CONSULTATION PAPER QUESTIONS

#	Consultation Paper Questions	FCAI Commentary
Protecting small businesses as consumers		
1	Should the proposed general prohibition (section 28B) be extended to also protect small businesses where they acquire goods or services as a consumer?	The FCAI does not oppose extending the proposed general prohibition to protect small businesses where they acquire goods or services in their capacity as a <i>consumer</i>, subject to conditions, including: • the application of an appropriate monetary threshold for the amount paid or payable for the goods or services acquired by the small business acting as a consumer; and • a clear definition of when a small business is acting as a consumer, including exclusion from the consumer-related protections when a small business acquires the goods or services for the purposes of re-supply. The FCAI notes that these safeguards are consistent with the existing section 3 ACL definition of “consumer” (the \$100,000 threshold and the re-supply exclusion in section 3(2)), which should be retained unaltered.
2	Should any adjustments be made to the proposed general prohibition when extending it to apply in respect of supply to small businesses? For example, should it: • only apply where there is a bargaining power imbalance between the supplier and the small business? • only capture conduct that causes, or is likely to cause, financial detriment to the small business? • not capture a supplier’s conduct if the conduct is reasonably necessary to protect the supplier’s legitimate interests?	The FCAI strongly opposes the blanket extension of a general unfair trading practices protection to business-to-business transactions. Should the Government determine that a general business-to-business prohibition should nonetheless proceed, the FCAI submits that such a prohibition should (at a minimum) contain limitations, including: • a legitimate-business-interests exception, mirroring ACL sections 22(1)(b) and 24(1)(b), so that conduct reasonably necessary to protect the legitimate interests of the party engaging in it is not caught; • a threshold requirement of significant bargaining-power imbalance, so the prohibition operates as the “safety net” the ACCC describes rather than a general fairness review of commercial contracts between capable parties; and • a harm element confined to financial detriment, which keeps the provision anchored to measurable effects.
3	Would it be appropriate to use the same small business threshold as is currently used in the unfair contract terms provisions of the ACL (i.e., characterising a small business as one with fewer than 100 employees and/or less than \$10 million annual turnover), or is another threshold appropriate?	As noted earlier in this submission, the case for unfair trading practices protection rests on consumer-like vulnerability, information asymmetry, resource constraints, and inability to protect one’s own interests.

#	Consultation Paper Questions	FCAI Commentary
		A franchisee with 100 or more employees and more than \$10 million turnover - which accurately describes many metropolitan new vehicle dealer groups, including listed entities - exhibits none of those features. The FCAI submits that it would be beneficial to clearly identify when a small business is acquiring goods and services as a consumer for the purposes of the application of any unfair trading practices protection.
4	Noting that most franchisees in Australia would be captured as small businesses, are there similar issues that impact franchisees that are not small businesses when they acquire goods or services as a consumer? If so, would any such issues be best addressed through reform to the ACL, or through other regulatory frameworks such as the Franchising Code?	Motor vehicle dealership agreements are taken to be franchise agreements (section 7(2) of the 2024 Franchising Code). The FCAI believes that general changes to business regulation should occur through the ACL and not the 2024 Franchising Code.
5	Are there interactions with other regulatory frameworks (including industry codes or other sector-specific laws) that should be considered in relation to this option? If so, how should these be managed?	Given the comprehensive regulation that already exists within the automotive sector, the FCAI is concerned at the confusion and additional costs that will be incurred as a result of overlapping and duplicate regulation should a new general unfair trading practices prohibition be introduced. A new prohibition would introduce: • an uncertain interaction with the unfair contract terms regime, which already voids and penalises unfair terms subject to a legitimate-interests element that a general prohibition may not contain; • an uncertain relationship with statutory unconscionability - in particular, whether <i>unfair</i> is intended to sit below the ACL section 21 threshold and, if so, how far below; • an uncertain interaction with the 2024 Franchising Code's good faith duty, which already governs the same negotiating and termination conduct with civil penalties attached; • an untested standard with no body of jurisprudence, whose practical meaning would be settled only through years of litigation.
6	Are there any examples of conduct on the 'grey list' for the proposed general prohibition that are not relevant where the consumer is a small business? Are there any additional examples that should be included where the consumer is a small business? If possible, please include evidence of the conduct's impacts (including prevalence and financial impact) on small businesses.	The FCAI contends that the "grey list" matters are comprehensively addressed in business-to-business transactions through existing regulation, as follows: • impeding the consumer's ability to exercise legal rights, or seek legal remedies: 2024 Franchising Code - mandatory dispute resolution procedures (Part 5), express obligation to act in good faith (section 18),

#	Consultation Paper Questions	FCAI Commentary
		statements with respect to independent advice (section 27) and freedom of association of franchisees (section 64); • failing to disclose material information to the consumer: 2024 Franchising Code - comprehensive pre-contractual disclosure (14-day disclosure period (sections 20-25), followed by a 14-day cooling off period) (sections 50-53)), pre-contractual disclosure of capital expenditure (section 47); • disclosing material information to the consumer in a complex, ineffective, unclear, unintelligible, ambiguous, untimely or overwhelming way: 2024 Franchising Code - statements with respect to independent advice (section 27); • creating an environment (including by using design elements in digital interfaces) which places the consumer under unreasonable pressure in relation to, or obstructs the consumer from, making or fulfilling the consumer's decision: 2024 Franchising Code - comprehensive pre-contractual disclosure (14-day disclosure period (sections 20-25), followed by a 14-day cooling off period) (sections 50-53)), pre-contractual disclosure of capital expenditure (section 47), restrictions on agreement provisions (restraint of trade (section 42), termination (sections 54-59), transfer (sections 24 and 48-49), no retrospective variation without consent) (section 62)), statements with respect to independent advice (section 27), mandatory dispute resolution procedures (Part 5). The ACCC has strong enforcement powers and resources. Substantial civil pecuniary penalties apply to almost every provision in the 2024 Franchising Code. The FCAI refers to Annexure C in this submission which provides an analysis of alleged automotive unfair trading practices and the protections available under existing law.
7	What would be the likely benefits to small businesses from extending the proposed general prohibition to small businesses? Would there be broader economic impacts from the extension? Where possible, please provide quantitative information or examples.	The FCAI believes that the extension of the proposed general prohibition to small businesses would: • conflict with well-established legal precedent; • introduce an uncertain interaction with the unfair contract terms regime; • introduce an uncertain relationship with statutory unconscionability;

#	Consultation Paper Questions	FCAI Commentary
		- introduce an uncertain interaction with the 2024 Franchising Code's good faith duty, which already governs the same negotiating and termination conduct with civil penalties attached; - likely increase litigation given it is an untested standard with no body of jurisprudence; and - increase compliance costs.
8	Would there be any <i>additional</i> compliance costs for businesses if the proposed general prohibition was extended to protect small businesses, noting the Bill if passed would already require businesses to comply in respect of supply to consumers? Please provide quantitative information or examples where possible.	The FCAI submits that there would be additional compliance costs – as was acknowledged in the relevant Regulatory Impact Statement. It is the FCAI's view that the proposal would increase costs to business (and therefore ultimately to the consumer) without any tangible benefit to business protections.
Unfair trading practices in business-to-business dealings		
9	What types of unfair trading practices are occurring in business-to-business dealings, and what harm does this cause small businesses? For each example: - Please provide details of the types of industries in which the conduct is occurring, and the types of business relationships (e.g. whether there is an ongoing relationship, whether there is an imbalance of bargaining power and whether the small business is a supplier or purchaser in such relationships). - How are small businesses harmed, and how significant is this harm? - Please provide quantitative evidence where possible (including prevalence, and size of harm). - Are there particular stage(s) of the business dealing in which unfair trade practices occur most often (e.g. pre-contractual, during an agreement)? - Is this conduct already subject to existing protections, for example, industry codes? To what extent could this conduct be addressed by extending the general prohibition proposed in the Bill to protect small business? - What types of protections could be introduced to address these issues and what would be the benefits and costs of these?	FCAI members and franchised new vehicle dealers are directly regulated by the 2024 Franchising Code (including Part 6, <i>New vehicle dealership agreements</i>) and the ACL. The FCAI believes that these mechanisms effectively and comprehensively address business practices within the automotive sector. The FCAI submits that additional regulation should not be imposed in the absence of identified harms that are not addressed through existing laws. The FCAI does not believe that any unfair trading practices affecting the commercial relationship between OEMs and new vehicle dealers have been identified where a remedy cannot be found in either the 2024 Franchising Code or the ACL. In such circumstances, duplicating regulation is wasteful, costly and counterproductive. The FCAI refers to Annexure C in this submission which provides an analysis of alleged automotive unfair trading practices and the protections available under existing law.
10	What factors affect whether a small business is likely to be harmed by unfair trading practices in business-to-business dealings (e.g. bargaining power	The FCAI reiterates that the application of the ACL and the 2024 Franchising Code effectively and comprehensively address business practices within the automotive sector.

#	Consultation Paper Questions	FCAI Commentary
11	imbalances, whether it is a medium or long-term relationship, whether the small business is a purchaser or supplier, whether an industry code applies)? If the Government were to introduce an economy-wide unfair trading practices prohibition that applies to business-to-business conduct: • What types of conduct should be captured and are there any specific forms of conduct that should be protected against (for example in a 'grey list')? Please provide reasons and evidence. • Should it apply to all business-to-business dealings involving a small business, or just a subset of these (for example, where there is a significant power imbalance between the parties, where there is a medium or long-term relationship between the parties, and/or where the small business is a supplier or purchaser)? Please provide reasons and evidence. • Should there be an exception for conduct that is reasonably necessary to protect the legitimate business interests of the party engaging in it? Please provide reasons and evidence. • Should there be a harm element and, if so, should that harm element include financial and non-financial harm? Please provide reasons and evidence. • What would be the potential costs and benefits? Please provide reasons and evidence. • What costs (including time, money, or forgone opportunities) are currently incurred by small businesses in guarding against or attempting to avoid being harmed by unfair trading practices? Please provide examples and evidence.	The FCAI strongly opposes the extension of the prohibition on unfair trading practices to business-to-business dealings for the following reasons: • such an extension would conflict with well-established legal precedent; • the conduct that prompted the regulatory concern resulting in the unfair trading practices legislation was overwhelmingly digital-to-consumer in character and was directed at subscription traps, drip pricing and hidden fees; • there are fundamental differences between business-to-consumer and business-to-business dealings; • the extensive existing regulation applying to the automotive sector already provides for extensive fairness and transparency in business-to-business dealings; and • few international jurisdictions broadly regulate unfair trading in business-to-business dealings. Those that do (Japan and South Korea) rely on defined lists of prohibited conduct rather than an open general standard, and do not do so alongside an existing overlay of misleading conduct, unconscionable conduct and unfair contract terms protections of the kind that already applies in Australia. A new prohibition would introduce: • an uncertain interaction with the unfair contract terms regime, which already voids and penalises unfair terms subject to a legitimate-interests element that a general prohibition may not contain; • an uncertain relationship with statutory unconscionability – in particular, whether <i>unfair</i> is intended to sit below the ACL section 21 threshold and, if so, how far below; • an uncertain interaction with the 2024 Franchising Code's good faith duty, which already governs the same negotiating and termination conduct with civil penalties attached; and • an untested standard with no body of jurisprudence, whose practical meaning would be settled only through years of litigation.

#	Consultation Paper Questions	FCAI Commentary
12	Would a new economy-wide unfair trading practices prohibition that applies to business-to-business conduct interact with other existing laws and regulations (such as industry codes)? How should any overlap or duplication be managed?	Given the comprehensive regulation that already exists within the automotive sector, the FCAI is concerned at the confusion and additional costs that will be incurred as a result of overlapping and duplicate regulation should a new general unfair trading practices prohibition be introduced. A single episode of ordinary commercial conduct - a franchisor declining to renew a dealer agreement and offering a new agreement on different financial terms - would be simultaneously governed by: - the 2024 Franchising Code (good faith, section 18; compensation, sections 43 and 45; return on investment, sections 44 and 46; and termination process, sections 54-59), enforceable via the <i>Competition and Consumer Act 2010</i> (Cth) (CCA) section 51ACB with penalties of 600 penalty units per breach for most obligations, increasing for the dealership compensation and return-on-investment provisions to the greater of \$10 million, three times the benefit or 10 per cent of adjusted turnover; - the ACL's existing general protections (sections 18, 20-22, 23-24, 50) - with maximum penalties for the penalty-bearing provisions (unconscionable conduct, unfair contract terms and the Part 3-1 unfair practices, including section 50) the greater of \$100 million, three times the benefit or 30 per cent of adjusted turnover for a body corporate, and \$2.5 million otherwise (sections 224(3)-(3A), following the <i>Treasury Laws Amendment (Doubling Penalties for ACCC Enforcement) Act 2026</i> (Cth)); and - a new, open-textured business-to-business unfairness standard - assessed after the fact, by reference to concepts (such as <i>unreasonably distort, detriment</i>) whose application to arm's-length commercial negotiation no court has yet considered. That is, there would occur overlapping regulation of substantially the same conduct, with three different tests, three penalty regimes and no interaction rules.
13	What costs or impacts would a new economy wide unfair trading practices prohibition that applies to business-to-business conduct have on businesses (e.g. compliance costs, changes to contracting practices or prices) and who would bear these costs? Please provide estimates where possible.	The consultation paper acknowledges that the introduction of a new provision could have a chilling effect on efficient bargaining, reduce contracting flexibility and raise input costs that are ultimately passed through to consumers. Those risks are compounded by legal uncertainty. A new prohibition would introduce:

#	Consultation Paper Questions	FCAI Commentary
		• an uncertain interaction with the unfair contract terms regime, which already voids and penalises unfair terms subject to a legitimate-interests element that a general prohibition may not contain; • an uncertain relationship with statutory unconscionability - in particular, whether <i>unfair</i> is intended to sit below the ACL section 21 threshold and, if so, how far below; • an uncertain interaction with the 2024 Franchising Code's good faith duty, which already governs the same negotiating and termination conduct with civil penalties attached; and • an untested standard with no body of jurisprudence, whose practical meaning would be settled only through years of litigation. Increased costs for business would ultimately be passed through to the consumer.
14	Previous consultations identified barriers that prevent small businesses from enforcing their rights, including cost of legal action, fear of retaliation, and knowledge of rights. How would such barriers affect the effectiveness of any new protection?	This issue is not relevant to the new vehicle dealership franchisees for the reasons noted throughout the submission.
15	Should unfair trading practice protections apply in respect of franchisees who exceed the proposed small business threshold (i.e. franchisees with 100 or more employees and more than \$10 million annual turnover)? Please provide reasons, including addressing the questions above where relevant.	As noted in the submission, the case for unfair trading practices protection rests on consumer-like vulnerability, information asymmetry, resource constraints, and inability to protect one's own interests. Any unfair trading practices protection should only apply to a small business when it is acting as an individual consumer.
16	If unfair trading protections were to apply to franchisees who exceed the small business threshold, what is the most appropriate mechanism to do this?	Any unfair trading practices protections should be introduced through the ACL.
Remedies		
17	If a general prohibition that addresses the unfair trading practices affecting small businesses was introduced, should the full range of remedies, including civil pecuniary penalties, be available? Why, or why not?	The FCAI's primary position is that no business-to-business prohibition should be introduced. Without derogating from that position, if a general prohibition were nonetheless introduced: • the full range of private and compensatory remedies (declarations, injunctions, damages and compensation orders) could appropriately be available from commencement; but • civil pecuniary penalties should not attach at commencement.

#	Consultation Paper Questions	FCAI Commentary
		A general, undefined standard whose practical meaning will be settled only through years of litigation is not an appropriate foundation for penal liability. That is the approach Parliament itself took with the unfair contract terms regime: unfair terms were void, but attracted no pecuniary penalty, from their introduction in 2010 (and from their extension to small business contracts in 2016) until 9 November 2023 (when penalties were introduced only after more than a decade of jurisprudence had defined the standard). The same staged approach should apply to any new prohibition.
18	What is the maximum civil penalty a court should be able to impose for a breach of any such provision? Should this be aligned with the maximum penalties available for other key provisions under the ACL?	If, contrary to the FCAI's submission, civil pecuniary penalties were to apply, the maximum should not be aligned with the ACL section 224(3A) tier (the greater of \$100 million, three times the benefit or 30 per cent of adjusted turnover). Parliament calibrates penal exposure to the definitional certainty of the norm: within the 2024 Franchising Code, the enhanced penalty tier (section 17 - the greater of \$10 million, three times the benefit or 10 per cent of adjusted turnover) is reserved for specific, clearly defined dealership obligations, while the open ended good faith duty (section 18) carries 600 penalty units. An open-ended unfairness standard, with no materiality threshold and no body of jurisprudence, sits at the same end of the certainty spectrum and should carry a correspondingly lower, penalty-unit-based maximum, to be reviewed once the provision has been judicially considered.
19	Should there be a transition period before any new laws commence, or before civil penalties apply to any new laws?	If the Government proceeds to introduce the new laws, a transition period should apply. Commencement should follow, not precede, the evaluation of the reforms already in train: the consumer prohibition itself does not commence until 1 July 2027, and the 2024 Franchising Code's economy-wide compensation and return-on-investment rules commenced only on 1 November 2025. Any business-to-business measure should not commence until those regimes have operated and been reviewed. Businesses would then require a transition period of at least 24 months to review and re-document contract suites and compliance programs across national dealer networks. Consistent with the FCAI's response to Question 17, civil penalties (if any) should not apply from commencement: a penalty-free initial period, accompanied by published regulator guidance, follows the precedent Parliament set with the unfair contract terms regime.



Why the proposed prohibition on “*unfair trading practices*” should be limited to consumer transactions and should not apply to business-to-business dealings¹.

Executive Summary

The Government has committed to enhancing consumer safeguards, with the legitimate expectation that consumers deserve to have confidence that the products they use are safe, fair and transparent. The ACCC Digital platform services inquiry final report in March 2025 recommends that the Government intervene to address inappropriate conduct in the digital sector. The Government’s proposal to prohibit unfair trading practices in consumer transactions is consistent with that recommendation.

This paper contends that the Government should not extend the prohibition on unfair trading practices to business-to-business dealings for the following reasons:

- 1) Any extension would conflict with well-established legal precedent that it is not the role of the courts to re-write commercial bargains freely made between parties transacting for profit. Introducing a broad, undefined statutory unfair trading practices test that applies to small business dealings would risk undermining this settled jurisprudence, leading to legal uncertainty, increased litigation, and a negative impact on commercial activity.
- 2) As recognised by Treasury in its second Consultation Paper, the conduct that prompted regulatory concern was overwhelmingly digital-to-consumer in character, such as manipulative user digital interface designs, concealed data harvesting and subscription and renewal traps. There is no evidence of systemic harm to small businesses in conventional commercial supply chains, let alone within the automotive and franchise sectors where comprehensive bespoke regulation already exists in the Franchising Code of Conduct.
- 3) Laws applying to the automotive sector already provide for extensive fairness and transparency. The Franchising Code of Conduct contains a comprehensive array of legal protections for motor vehicle dealers and franchisees and includes a statutory duty of good faith that complements prohibitions in the Australian Consumer Law on misleading or deceptive conduct, unconscionable conduct and unfair contract terms in standard form small business contracts such as motor vehicle dealership agreements and franchise agreements. Substantial civil pecuniary penalties already apply, with enforcement of the Code and the ACL under the strong oversight of the Australian Competition and Consumer Commission, which has extensive investigation and enforcement powers and resources.
- 4) There are fundamental differences between consumer and business dealings. In commercial transactions, each party pursues profit, is expected to be able to enter into commercial bargains with other businesses and is able to allocate or deal with risk contractually. Many commercial risks are insurable. To introduce a subjective “fairness” test, which is better suited to consumer protection, onto commercial dealings would undermine freedom of contract, heighten legal uncertainty, and deter investment.
- 5) Regulation of business-to-business dealings would put Australia out-of-step with other nations², create unnecessary additional compliance costs and negatively impact economic activity.

¹ This paper has been prepared by Norton Rose Fulbright at the request of the Federal Chamber of Automotive Industries. It focuses primarily on the legal reasons why it is inappropriate and unnecessary to extend any new general and undefined prohibition on “unfair trading practices” to business-to-business dealings.

² Examples given in Treasury consultation papers cite prohibitions on unfair trading practices in other jurisdictions. Those jurisdictions limit the application to business-to-consumer dealings and/or do not also have prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms. See section 5) of this paper. In the Australian automotive and franchise sectors there are also the statutory good faith obligations and the specific conduct and contract requirements of the Franchising Code of Conduct that need to be considered in the context of any international comparison.

1) Conflict with existing law

As Treasury's Consultation Regulatory Impact Statement acknowledged, many practices that would come within the scope of a new prohibition on "unfair trading practices" are already captured under the Australian Consumer Law by the prohibitions on misleading or deceptive conduct (s18), unconscionable conduct (s20-22) or unfair contract terms (Part 2-3). In addition, the automotive and franchise sectors are regulated by the Franchising Code of Conduct, which has extensive disclosure obligations, regulates the content of dealer and franchise agreements in key areas and has a statutory requirement to act in good faith. The introduction of a new general prohibition on "unfair trading practices" clearly therefore risks substantial duplication, and would likely lead to forum shopping, parallel proceedings and inconsistent judicial outcomes.

Australian courts have long emphasised that their role is not to police the substantive fairness of commercial bargains. The statement of Kirby P in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 is often cited to confirm that fairness is not a general principle in contract law. In that case a court refused to enforce a promise to establish an employee share scheme because it was vague and uncertain. Kirby P remarked: "*I doubt that, statute or special cases apart, [contract law] does or should enforce a regime of fairness upon the multitude of economic transactions governed by the law of contract.*"

It is generally expected that parties will carry out their bargains, with the statement of Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723 frequently quoted - "*generally speaking equity expects men to carry out their bargains*". Similarly, courts will not remake the parties' contract simply because "*one party has made a bad bargain*" (See *Legione v Hateley*, per Mason and Deane JJ (CLR) at 447). In *Stern v McArthur* [1988] 81 ALR 463, the High Court of Australia confirmed a judicial reluctance to interfere with the contractual rights of parties and only intervene where it is necessary to avoid injustice. "*In considering whether such intervention is justified, great weight will be given to the bargain which the parties have made for themselves*".

In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) [2015] HCA 37 a dispute arose over royalty entitlements under a complex mining agreement. One party argued for an interpretation that would avoid an "unfair" outcome. The High Court emphasised that interpretation depends on the objective meaning of the words used, read in their text, context and purpose, not on notions of fairness or commercial reasonableness. Similarly in *Apple and Pear Australia Ltd v Pink Lady America LLC* [2016] VSCA 280 the Court did not accept arguments that certain terms in an Options Deed were unfair and should be construed differently. The court focused on the contractual language and its commercial context and confirmed that courts will not rewrite bargains simply because they appear harsh or one-sided. These decisions reinforce that fairness is not a relevant criterion in construing commercial contracts.

In a recent case (*Karpik v Carnival plc* [2023] HCA 39) the High Court considered the concept of fairness in the context of a consumer class action and the operation of the unfair contract terms regime under the ACL. The Court noted that the concept of unfairness needs to be constrained, and parties generally retain freedom to allocate risks and choose governing law, outside of standard form consumer contracts and subject to statutory limits.

These cases demonstrate a consistent judicial reluctance to determine "fairness" in commercial settings aside from conduct that is exploitative, misleading, unconscionable or in bad faith. These concepts go to the validity of the bargain, and whether it was fairly made. They do not seek to determine "fairness" in a colloquial sense – it is up to the parties in a business dealing to make their own assessment in the context of risk, reward and other business factors. Introducing a broad, undefined statutory unfair trading practices test that applies to small businesses would risk undermining this settled law. Future cases could then potentially yield different results, undermining the value of substantial legal precedent and to legal uncertainty, increased litigation and a negative impact on commercial activity in Australia. Businesses may become reluctant to engage in innovative or bespoke arrangements if fairness becomes an open-ended test.

2) Identified inappropriate conduct in the digital sector

The recommendation for a prohibition on unfair trading practices emanated from the ACCC final report in its Digital platform services inquiry in March 2025 (**the Digital Inquiry Report**). The ACCC examined digital platforms in three inquiries since 2017, noting that almost all Australian adults used a device to connect to the internet and reliance on digital platforms was profound and growing.

The Report identified³ the following risks of consumer harm on digital platforms of all sizes, including Australian based platforms:

- A range of unfair trading practices, including choice architecture that exploits consumers' behavioural biases and undermines consumer choice.
- Harmful apps that are made available on app marketplaces, despite app marketplace review processes.
- The practice of creating, buying and selling fake reviews and otherwise manipulating reviews is distorting competition in related markets and undermining trust in digital platforms, and has significant consequences for affected businesses.

The ACCC's arguments concerning the digital sector and potential competition and consumer threats are compelling. Few could argue that the concerns are valid, and these inappropriate digital practices deserve regulatory attention. The ACCC identified six core areas where conduct was harmful to consumers but in its view fell outside existing prohibitions on misleading or deceptive conduct, unconscionable conduct or unfair contract terms:

- (1) **Subscription Traps** - Practices where consumers are signed up to ongoing subscriptions without clear disclosure of renewal terms or cancellation processes. These were often combined with complex or obstructive cancellation pathways that make it difficult for consumers to exit.
- (2) **Drip Pricing** - Advertising a low headline price that increases through hidden fees or charges revealed only late in the purchasing process. This was common in online retail and digital service platforms.
- (3) **Dark Patterns in User Interfaces** - Design elements that manipulate consumer decision-making, such as pre-selected options that favour the platform, countdown timers or false scarcity signals to pressure quick decisions and interfaces that obscure or complicate the ability to opt out or cancel.
- (4) **Omission or Overload of Material Information** - failing to provide essential information about terms, fees, or data use or alternatively, overwhelming consumers with excessive or confusing disclosures that make informed choice impractical.
- (5) **Impeding Consumer Rights** - Practices that obstruct consumers from exercising contractual or statutory rights, such as refunds or dispute resolution. Examples include requiring unnecessary steps or imposing unreasonable delays.
- (6) **Exploitative Data Practices** - Using consumer data to personalise offers or pricing in ways that disadvantage certain users without transparency. This includes behavioural targeting that nudges consumers toward higher-cost options.

³ ACCC Digital platform services inquiry final report, March 2025, page 4.

It is hard to see how most of these activities are not already covered by the prohibition on misleading or deceptive conduct, which has been broadly interpreted by the courts and includes conduct that has “*the potential to mislead or deceive*”. There are literally hundreds of cases where courts have found that conduct is misleading or deceptive. Existing laws seem to be adequate.

If existing laws are found to be inadequate targeted additional regulation should be preferred. As Treasury’s 2023 Consultation Regulation Impact Statement (**Consultation RIS**) acknowledged, the conduct prompting regulatory concern was overwhelmingly digital-to-consumer in character. Although the same protections could be extended to small businesses in the context of similar dealings with digital platforms any such protection should be limited to dealings with those platforms by small business essentially in the capacity of a consumer.

If Government is contemplating a general prohibition on unfair trading practices in consumer transactions such a general prohibition should not be extended to business-to-business dealings. There is no evidence of systemic harm to small businesses in conventional commercial supply chains, let alone within the heavily regulated automotive and franchise sectors.

This issue is of particular concern due to the ease with which consumer protections have in the past been extended to “small business” simply by adding “and small business” after the word “consumer” in the Australian Consumer Law. This is exacerbated by the fact that the definition of small business has been extended to businesses employing 100 people. Many automotive companies and many automotive dealers would employ less than 100 people in Australia notwithstanding they are quite sophisticated businesses with significant turnover.

Any new business-to-business unfair trading regulation is therefore likely to have quite widespread adverse impact, undermining certainty and adding unnecessary cost to Australian businesses.

This problem would be exacerbated if the Government sought to introduce a general prohibition on unfair trading practices into the Franchising Code of Conduct. This would be a perverse outcome given the conduct arose in relation to digital platforms, yet the digital sector and all other areas of business are not covered by the Code. It would also be a highly questionable legislative approach given a prohibition on unfair trading practices in consumer dealings and all other business-to-business dealings would need to occur via amendments to the Australian Consumer Law, and after consultation with State governments. reforms to As with the prohibitions on unfair contract terms in standard form small business contracts, the appropriate framework for any change is via amendments to the Australian Consumer Law and not via some back door form of regulation

3) Existing regulation already provides desired transparency and fairness

The automotive and franchise sectors are not only subject to the prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms in standard form small business contracts but are also covered by the Franchising Code of Conduct (**the Code**). Fairness and transparency have been at the heart of these specific industry laws.

The Code's regulatory framework is underpinned by a comprehensive pre-contractual disclosure process that requires the provision of an Information Statement explaining franchising followed by a detailed Disclosure Document with extensive information on the franchise and the franchisor. The disclosure process features a 14-day disclosure period during which a franchise agreement cannot be signed to allow for the franchisee to read the documentation and obtain legal and business advice. There is also a 14-day cooling off period. Franchisors are required to be registered on the Franchise Disclosure Register, where certain mandatory information must also be provided. The Register is freely available for public inspection.

The Code contains an express duty of good faith that extends the common law duty and makes it clear that the obligation applies to all within the automotive and franchise sectors.

The Code also contains restrictions on provisions that can be inserted in dealer and franchise agreements, as well as mandatory provisions that must be inserted in relation to dispute resolution, return on investment, restraint provisions and compensation and asset buyback in the event of early termination. It also has operational restrictions in relation to issues such as special purpose and marketing funds, transfers, termination and dispute resolution.

The Code is also overseen by the ACCC. Substantial pecuniary apply to almost every provision in the Code. The ACCC has a strong track record of effective enforcement of the Code.

Transparency is at the heart of the disclosure process and other requirements of the Code:

- The disclosure document must contain detailed information concerning the history and financial position of the franchisor, and all establishment and ongoing costs associated with the franchise. It must include contact details of existing and past franchisees, information on supply chain, details in relation to marketing expenditure and information on almost every conceivable issue a franchisee would consider material to a decision to enter into the dealership or franchise agreement. Franchisees are actively encouraged to obtain legal and business advice prior to entering a franchise agreement, and a franchisor must not enter into, renew or extend a franchise agreement unless the franchisor has received from the franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code together with signed statements that the franchisee has either been given advice about the proposed franchise business, from at least an independent legal adviser, business adviser or accountant or has been told that such advice should be sought but has decided not to seek it.
- A franchisor must prepare and provide to franchisees an annual statement of receipts and expenses of any special purpose fund, including the percentage spent on production, advertising, administration and other stated expenses. It must also have the statement audited by a registered company auditor. Contributions to the fund must be kept in a separate bank account and only be spent in the manner prescribed by the Code.
- Franchisors have additional disclosure obligations to clarify for franchisees what, if any, arrangements exist in relation to ending the franchise term. Franchisors must also give at least 6 months' notice of their decision to renew or extend (or not to renew or extend) a franchise agreement.

- Provisions in the franchise agreement must comply with the Code's requirements in relation to issues such as releases of liability, freedom of association of franchisees, cooling off, assignment and termination.
- A franchisor is required to disclose to a franchisee if it becomes aware of certain materially relevant facts, including any change in majority ownership or control of the franchisor and any proceedings against the franchisor. Disclosure must be made within a reasonable time, but not later than 14 days after the franchisor becomes aware of the relevant facts.

Similarly, in the context of "fairness" the Code provides:

- A franchisor cannot unreasonably withhold consent to a franchisee's request to assign a franchise agreement.
- The Code significantly limits the basis on which a franchisor can terminate a dealership or franchise agreement.
- A dealer / franchisee has the right to request termination of a franchise agreement, and a franchisor is obliged to respond to the request.
- The Code contains a mediation process which, if activated by a party, is mandatory. If the parties do choose mediation or arbitration, the mediation or arbitration must be conducted in Australia. Where there are similar disputes, franchisees or the franchisor may require that they are resolved by a single dispute resolution practitioner and process.
- Mandatory clauses need to be included in franchise agreements that:
 - provide for the franchisee to make a reasonable return on any investment required by the franchisor;
 - provide for the franchisee to be compensated in the event of early termination and specify how compensation is calculated;
 - provide for buyback or compensation for vehicles, spare parts and special tools in the event of early termination or non-extension of a dealership agreement.

Noting the extent and detail of these industry specific requirements, it is not surprising that the comprehensive review of the Franchising code of Conduct in 2024 that led to further changes to the Code which took effect 1 April 2025 and 1 November 2025 did not include a recommendation for legislation to prohibit "unfair trading practices" in the automotive or franchise sectors.

It is not appropriate to introduce a general prohibition on unfair trading practices that would catch business-to-business dealings in the automotive and franchise sectors when there is an existing mechanism that comprehensively regulates trading practices in those sectors.

4) The contrast between consumer and business dealings

There are fundamental differences between consumer and business dealings. This is most obvious when the types of consumer transactions identified by the ACCC in the Digital platform services inquiry. In those transactions consumers often have no information, no ability to bargain let alone bargaining power, little time to make a considered decision and minimal opportunities for redress.

The digital businesses transacting are often based in foreign jurisdictions and there is minimal regulatory oversight of their activities. The consumer is typically not seeking to make a profit or adjust risk but is simply seeking to purchase a good or service based on information provided.

In commercial transactions, each party pursues profit, is expected to be able to enter into predictable and certain commercial bargains with other businesses and possess a degree of commercial sophistication. They have access to professional advice, including legal and financial counsel, and can negotiate terms, allocate risk, and structure agreements to suit their commercial objectives.

Most business activities involve some risk, and most business dealings involve an assessment of relevant risk versus reward. Many commercial risks are insurable.

Deciding to import and promote motor vehicles into Australia and opening a motor vehicle dealership both involve risk, with reward being incapable of precise estimation and business success a function of many tangible and intangible factors. The Franchising Code of Conduct intervenes in these types of business dealings to ensure a bargain is fairly made. Any information asymmetry is addressed by the requirement to provide detailed disclosure. Practices considered to be inappropriate have been specifically prohibited by the Code.

Unlike consumers, businesses can negotiate terms, seek alternatives, and allocate risks based on commercial judgment. Imposing universal fairness standards assumes universal vulnerability in business-to-business dealings – this is clearly a false assumption.

The ability to contract freely and allocate risk is a cornerstone of commercial law and underpins investment and innovation. Imposing a broad, subjective "fairness" standard on these dealings would undermine the certainty and predictability that businesses rely on, potentially deterring investment and leading to more conservative, less flexible contracting practices.

Certainty and enforceability of contracts are essential for efficient markets. Australian courts have consistently held that commercial parties are expected to look after their own interests and that the law should not intervene simply because one party has struck a better bargain. The freedom to negotiate, accept, or reject terms is what allows markets to function efficiently and encourages parties to innovate and compete.

Business dealings and practices rely on predictability and enforceability of negotiated bargains. Introducing a fairness test would undermine contractual certainty, increasing litigation risk and discouraging bespoke arrangements. A fairness standard could retrospectively alter agreed risk allocations, distorting pricing and investment decisions.

The uncertainty created by a broad unfair trading practices prohibition would encourage counterparties, particularly larger suppliers and financiers, to price in risk through tighter credit terms, higher interest margins, or refusal to contract with smaller businesses.

Dynamic commercial experimentation, including subscription models, data-driven customer insights, and variable pricing, supports productivity and consumer choice. A vague fairness overlay would deter businesses from trialling novel offerings for fear of inadvertent breach and would place Australian small businesses at a disadvantage relative to offshore competitors not subject to equivalent constraints. This would risk higher prices for inputs, delayed product launches, and reduced export agility.

5) Inconsistent with international regulation

Regulation of unfair trading practices in business-to-business dealings would put Australia out-of-step with other nations, catch foreign businesses doing business in Australia by surprise and potentially impact economic activity.

Most major jurisdictions, including the United Kingdom, United States and European Union, do not impose broad, open-ended fairness standards on business-to-business dealings. Instead, they rely on targeted rules. Australia would be out-of-step with international legal norms which could have significant implications in international transactions. It may well place Australia in breach of some commitments concerning international free trade.

To provide an example of how the UK addresses similar concerns in relation to digital markets, the *Digital Markets, Competition and Consumers Act 2024 (DMCC Act)* targets only consumer-facing practices. It does not target business-to-business dealings. The DMCC Act took effect in April 2025, replacing the *Consumer Protection from Unfair Trading Regulations 2008*. It is quite similar to the existing provisions of the Australian Consumer Law, as it focuses on misleading actions, omissions, aggressive practices, and lack of professional diligence towards consumers. Interestingly the Act lists 32 practices considered unfair (such as pyramid schemes, fake reviews, drip pricing). All are consumer-oriented - there is no general fairness test for business-to-business dealings.

In the US the focus is on competition law and antitrust enforcement, not fairness standards. The Federal Trade Commission Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices,” but these are interpreted in the context of anticompetitive conduct, not general fairness in business-to-business contracts.

In the European Union the EU Directive on Unfair Trading Practices the specific examples of unfair trading practices are much narrower in scope than Australia and relate to more fundamental issues already addressed by existing Australian laws such as late payments, unilateral contract changes and unfair termination. Business-to-business dealings are regulated according to normal freedom of contract principles, except in the case of exceptional circumstances such as significant power imbalance.

As Treasury’s Consultation RIS acknowledged, many alleged unfair trading practices are already captured under the ACL by section 18 (misleading or deceptive conduct), sections 20 to 22 (unconscionable conduct), or Part 2-3 (unfair contract terms).⁴ The proposed prohibition therefore risks substantial duplication, fostering forum shopping, parallel proceedings, and inconsistent jurisprudence.

In previous submissions to Treasury as part of the consultation process the FCAI, peak bodies such as the Australian Retailers Association, the Shopping Centre Council and the Franchise Council of Australia and legal practitioners have warned that an open-textured unfair trading practices rule would dramatically increase legal and compliance costs, delay commercial negotiations, and impede investment. Businesses will likely need to seek constant legal advice or adopt excessively conservative approaches business dealings to mitigate risk.

The current regulatory framework provides small businesses with a comprehensive, flexible, and effective set of protections against unfair trading practices. The ACL, the UCT regime, and sector-specific regulations work together to address the full spectrum of potential harms, from misleading conduct and unfair contract terms to industry-specific issues. These protections are highly comprehensive and seem to be adequate to safeguard the interests of small businesses in Australia.

⁴ See also comments in section 2) that suggest that the concerns specifically identified may well already be covered by the prohibition on misleading or deceptive conduct in s18 of the ACL.

ANNEXURE C: ANALYSIS OF ALLEGED AUTOMOTIVE UNFAIR TRADING PRACTICES AND THE PROTECTIONS AVAILABLE UNDER EXISTING LAW

The AADA has alleged a number of current practices employed by OEMs could amount to unfair trading practices. An analysis of alleged automotive unfair trading practices and the extensive remedies available under existing law is set out in the table below.

#	What the AADA says happens	What the law already does about it	Act / Code Reference
1	The manufacturer ends the dealer agreement early or does not renew it.	The dealer agreement must state up front what compensation is paid if the franchisor ends it early, and how it is worked out (including lost profit and unrecovered spending). The agreement must give the dealer a real chance to earn back, during the term, any money the franchisor required it to invest. Termination must follow the Code's notice-and-dispute process, and the franchisor must act in good faith throughout - including in deciding not to renew. If a dealership agreement is not renewed, the franchisor must also buy back or compensate the dealer for new road vehicles, spare parts and special tools (section 45(3)). Breach attracts civil penalties: 600 penalty units for most Code obligations and, for the dealership compensation and return-on-investment provisions, the greater of \$10 million, three times the benefit or 10 per cent of adjusted turnover (section 17).	2024 Franchising Code: - sections 45 (dealerships) and 43 (all agreements, from 1 Nov 2025); - sections 46 and 44 (return on investment); - sections 54-59 (termination process); - section 18 (good faith). CCA: - section 51ACB.
2	Dealers are pressured to sign a new deal (for example, an agency model) on short deadlines, on take-it-or-leave-it terms.	The good faith duty applies to the negotiation of a franchise agreement, not just its performance. Unconscionable conduct is prohibited, with relative bargaining strength, undue influence or pressure, and unfair tactics expressly listed as relevant factors. If the new agreement is a standard form contract, any unfair term is void and attracts civil penalties. Where the elements of economic duress are established, the transaction may be set aside at general law.	2024 Franchising Code: - section 18 (good faith). ACL: - sections 21-22; - sections 23-24 (unfair contract terms). General law duress.
3	The manufacturer makes big unilateral changes to the business model, with little or no genuine negotiation.	A term letting one side unilaterally vary key terms of a standard form contract may be void under the unfair contract terms regime, depending on the application of the statutory test in section 24 (namely whether the term creates a significant imbalance, is not reasonably necessary to protect the advantaged party's legitimate interests, and would cause detriment). Such a right is expressly listed among the statutory examples of potentially unfair terms (section 25(d)), and the advantaged party bears the onus of proving the term reasonably necessary (section 24(4)). Proposing, applying or relying on an unfair term is now a penalty-bearing contravention.	ACL: - sections 23-24 (test at section 24(1)); - sections 21-22. 2024 Franchising Code: - section 18 (good faith).

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		Systemic conduct around such a change is measured against the statutory unconscionability standard and the Code's good faith duty.	
4	Dealers are required to make large capital investments (showroom upgrades, tooling) and then lose the benefit of them.	The Code prohibits a franchisor from requiring significant capital expenditure except in defined circumstances, requires disclosed significant capex to be discussed with the franchisee before the agreement is made, requires the agreement to give the franchisee a reasonable opportunity to earn a return on required investment during the term, and requires compensation on early termination. These provisions were introduced for new-vehicle dealerships in 2020-21 and are now being extended economy-wide.	2024 Franchising Code: - section 60 (limits on required capex), - section 47 (capex discussion); - sections 46 and 44 (return on investment); - sections 45 and 43 (compensation).
5	Threats of commercial payback - delisting, reduced supply, non-renewal - if a dealer complains, joins a class action, or seeks better terms.	Undue harassment or coercion in connection with the supply of, or payment for, goods or services is prohibited; the threat need not involve anything independently unlawful. Retaliatory exercise of contractual powers is constrained by the good faith duty. Dealers have Code-protected dispute pathways (including arbitration) and can bargain collectively under the ACCC class exemption.	ACL: - section 50; - Part 5 (sections 68-83) (dispute resolution and arbitration). CCA: - Part IV collective bargaining class exemption. 2024 Franchising Code: - section 18 (good faith).
6	Withholding or delaying money the dealer is owed (including warranty and incentive payments) or deducting hidden fees.	Money due under the agreement is a contract debt, recoverable with Code dispute-resolution support. A manufacturer must indemnify a supplier (including a dealer) for consumer guarantee claims the dealer honours. Systemic withholding to extract concessions is assessable as unconscionable conduct - section 21 expressly applies to a system of conduct or pattern of behaviour (section 21(4)(b)) - and as undue coercion.	ACL: - section 274 (indemnification); - sections 21, 50. 2024 Franchising Code: - section 65; - Part 5 (sections 68-83).
7	Misleading statements in consultation on a new model (for	Misleading or deceptive conduct in trade or commerce is prohibited outright; intention is irrelevant, and silence can mislead where disclosure is reasonably expected.	ACL:

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	example, "no dealer will be worse off").	Pre-contractual representations to franchisees are further disciplined by the Code's mandatory disclosure document regime. The conduct of that character falls squarely within the reach of section 18.	- section 18. CCA: - section 51ACB. 2024 Franchising Code: - Schedule 1 disclosure regime.
8	A manufacturer with market muscle squeezing dealers on supply, territory or dealing terms.	Conduct by a firm with substantial market power that has the purpose, effect or likely effect of substantially lessening competition is prohibited, as is exclusive dealing with that effect - covering refusal to supply, restrictions on who a dealer may deal with, and territorial conditions. Although directed principally to protecting competition rather than correcting bilateral unfairness, these provisions regulate important aspects of manufacturer-dealer conduct where market power affects competitive outcomes.	CCA: sections 46, 47.